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No. 94-325

In The

Supreme Court of the United States

October Term, 1994

CHANDRIS, INC., CHANDRIS, S.A. and FOURTH TRANSOCEANIC SHIPPING CO., LTD.,

Petitioners,

v.

ANTONIOS LATSIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITIONERS' BRIEF ON THE MERITS

DAVID W. MCCREADIE
(Counsel of Record)
DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
Post Office Box 838
Tampa, Florida 33601-0838
(813) 229-2121

and

CHRIST STRATAKIS
WILLIAM J. BRADY, III
POLES, TUBLIN, PATESTIDES
& STRATAKIS
46 Trinity Place
New York, New York 10006
(212) 943-0110

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHETHER TO QUALIFY AS A SEAMAN UNDER THE JONES ACT, 46 U.S.C. § 688, A MARITIME WORKER MUST, AT A MINIMUM, PERFORM A SUBSTANTIAL PART OF HIS WORK ON A VESSEL IN NAVIGATION.

LIST OF PARTIES

The parties are Petitioners Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., and Respondent Antonios Latsis.

Petitioners Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd. are affiliated with the following corporations: Celebrity Cruises, Inc., Celebrity Cruise Services Ltd., Celebrity Cruises (Management), Inc., Celebrity Cruise Lines, Inc. and Chandris (England) Limited.

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On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The Order denying the Petition for Rehearing in the United States Court of Appeals for the Second Circuit (J.A. 248-249) is unreported. The opinion of the Second Circuit (J.A. 215-247) is reported at 20 F.3d 45. The opinion of the United States District Court for the Southern District of New York (J.A. 212-214) is unreported.

JURISDICTION

The opinion of the Second Circuit was entered on March 24, 1994. (J.A. 215-247). Petitioners timely filed a Petition for Rehearing, which was denied by a Court of Appeals order entered on May 24, 1994. (J.A. 248-249). The Petition for Writ of Certiorari was filed on August 22, 1994, and was granted on October 17, 1994. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

Article III, Section 2, Clause 1, of the United States Constitution, provides, in relevant part, that "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

JONES ACT STATUTORY PROVISION

The Jones Act, 46 U.S.C. § 688, provides, in relevant part, "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law. . . . "

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT STATUTORY PROVISION

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3), provides, in relevant part, " 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-

worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel. . . . "

STATEMENT OF THE CASE

Factual Background

Respondent Antonios Latsis ("Mr. Latsis") started his employment with Petitioners Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd. (collectively "Chandris") in September 1988. (J.A. 49). For the first three months, Mr. Latsis was employed by Chandris as an engineering consultant. (J.A. 48-49). In January 1989, Chandris employed Mr. Latsis as a salaried superintendent engineer. (J.A. 54-56, 173). As a superintendent engineer, Mr. Latsis was responsible for updating and upgrading the electronic and communication equipment on the Chandris vessels. (J.A. 173).

Mr. Latsis' assignment was to update and upgrade shipboard equipment for six passenger ships in the Chandris fleet, including the S/S GALILEO. (J.A. 51-53, 173-175). Each passenger ship in the Chandris fleet carried between 12 and 14 sea-based licensed engineers who were permanently assigned to a specific vessel. (J.A. 174-175). Mr. Latsis was not assigned to any particular Chandris vessel. (J.A. 176).

Mr. Latsis was one of two superintendent engineers based at Chandris' Miami, Florida office. (J.A. 112-113, 173-174). Chandris' Miami office is the principal United States office of the Chandris engineering department. (J.A. 54). Although Chandris assisted Mr. Latsis with payments for an apartment and automobile in Miami, Mr.

Latsis and his family maintained a residence in Rye, New York. (J.A. 54-55, 173-174).

Primarily, Mr. Latsis planned and directed work aboard the Chandris fleet from shore. (J.A. 106-107, 173-174, 177). When necessary to perform his job as a superintendent engineer, Mr. Latsis boarded the various Chandris vessels while they were in port and between trips. (J.A. 107-108, 176). On some occasions, Mr. Latsis would remain on board a particular vessel during all or a portion of its voyage to investigate or assist with specific engineering problems. (J.A. 107-108, 178).

The evidence in the District Court regarding the percentage of work time that Mr. Latsis spent on board Chandris vessels is in conflict. Mr. Latsis opined that he spent seventy-two percent of his time aboard Chandris vessels. (J.A. 57-58). Mr. Latsis' supervisor, Senior Vice President Demetrios Kaparis ("Mr. Kaparis"), testified that Mr. Latsis was on Chandris vessels only ten percent of Mr. Latsis' work time. (J.A. 179-180). No definitive documentary evidence was presented in the District Court regarding Mr. Latsis' time on vessels.

Although Mr. Latsis did hold a deck officer's license issued in Greece, Mr. Latsis did not sail on that license after 1967. (J.A. 168). Mr. Latsis' employment between 1967 and September 1988 consisted of land-based work as a marine surveyor, marine engineer, naval architect and superintendent engineer for a steamship company. (J.A. 36-43).

On May 14, 1989, Mr. Latsis was on board the S/S GALILEO along with Mr. Kaparis and several other superintendent engineers. (J.A. 91). Mr. Latsis and the

other superintendent engineers, who were all employed in the shore-side engineering department of Chandris, were on board the vessel for the purpose of assisting and providing information to shipyard representatives who had been requested to submit bids for a major rebuilding of the S/S GALILEO. (J.A. 61-63, 180).

Prior to sailing on the S/S GALILEO on May 14, 1989, Mr. Latsis experienced vision problems in his right eye. (J.A. 63-64, 159). Mr. Latsis' vision problems continued and Mr. Latsis consulted with the ship's physician, Dr. Gonzalez, shortly after the vessel sailed from Baltimore, Maryland en route to Bermuda. (J.A. 64-65). After examining Mr. Latsis, Dr. Gonzalez recommended that Mr. Latsis consult with an ophthalmologist when the S/S GALILEO arrived in Bermuda on May 16, 1989. (J.A. 67-68).

Prior to disembarkation for medical treatment in Bermuda, Mr. Latsis was given a Chandris form requesting and authorizing shoreside medical treatment for his eye. (J.A. 78-80, 196-198, 208). The form was dated May 14, 1989, and was signed by the ship's captain, chief purser and Dr. Gonzalez. (J.A. 78-80, 208). On the form, the name "Latsis Antonios" was typed after the printed words "name of crew member" and "Supt. Engineer" was typed after the printed words "position." "Rule out Detected [sic] Retina please" was typed after "Ship's Doctor's Remarks." The printed form also contained other references to "crew member." (J.A. 77-80, 208).

In Bermuda, the ophthalmologist determined that Mr. Latsis had suffered a detached retina. (J.A. 74). The

ophthalmologist performed surgery on Mr. Latsis' eye on May 17, 1989. (J.A. 80, 82-83, 123, 182-185).

After recuperating at his home in New York for approximately three months, Mr. Latsis returned to his employment as a land-based superintendent engineer in Chandris' Miami office. (J.A. 88-89, 123).

The rebuilding of the S/S GALILEO eventually occurred between October 1989 and March 1990 at Bremerhaven, Germany. (J.A. 89, 91, 134-135). Mr. Latsis sailed to and from Bremerhaven aboard the S/S GALILEO and attended on board while the work on the S/S GALILEO was performed in drydock in Bremerhaven. (J.A. 89, 133-135, 199-200).

Mr. Latsis' employment with Chandris terminated in November 1990. (J.A. 56-57, 95, 186-187).

Procedural History

In October 1991, Mr. Latsis commenced a lawsuit against Chandris based solely on the Jones Act, 46 U.S.C. § 688. (J.A. 4-7). Mr. Latsis' suit alleged that his eye injury occurred while employed as a seaman by Chandris, Inc. In March 1992, Mr. Latsis filed an amended complaint naming additional defendants "Chandris, S.A. and Trans Oceanic Shipping Co., Ltd.," as alleged owners of the vessel. (J.A. 8-12). Chandris answered the amended complaint and denied Mr. Latsis' allegation that he was a seaman within the meaning of the Jones Act. (J.A. 17-21).

In June 1993, a jury trial was held in the District Court. At the conclusion of the trial, the District Court instructed the jury on the law. (J.A. 209-211). The jury

instruction utilized by the District Court regarding seaman status ("District Court Instruction") was based on *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) and *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 348 (1991). The District Court Instruction stated that Mr. Latsis was a seaman if:

> [T]he plaintiff was either permanently assigned to the vessel or performed a substantial part of his work on the vessel. In determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may not consider the period of time the Galileo was in drydock in Germany, because during that time period she was out of navigation. You may, however, consider the time spent sailing to and from Germany for the conversion. Also, on this first element of being a seaman, seamen do not include land-based workers.
>
> * * *
>
> "[Y]ou should know that a vessel in this instance may be a single ship or a number of ships owned and operated by the employer."

(J.A. 210-211). Mr. Latsis objected only to the portion of the District Court Instruction regarding the irrelevancy of the S/S GALILEO's time in drydock. *Latsis v. Chandris, Inc.*, 20 F.3d 45, 49 (2d Cir. 1994).

After deliberating, the jury rendered a verdict finding that Mr. Latsis was not a seaman. In accordance with the jury verdict, the District Court entered a judgment dismissing the lawsuit on June 17, 1993. (J.A. 212-214).

In July 1993, Mr. Latsis appealed to the Second Circuit. (J.A. 224). On March 24, 1994, the Second Circuit

vacated the District Court's judgment based on the Second Circuit's conclusion that the District Court Instruction constituted plain error. *Latsis*, 20 F.3d at 54-55, 58. The Second Circuit vacated the District Court's dismissal and ordered a new jury trial even though the record contained competent evidence that Mr. Latsis spent only ten percent of his time aboard ship. *Latsis*, 20 F.3d at 48, 54.

In remanding this case to the District Court for a new trial, the Second Circuit ordered the District Court to instruct the jury as follows:

> The [seaman status] test will be [satisfied if you find] that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) *the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature*; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

Latsis, 20 F.3d at 57 (emphasis added) (hereinafter "Latsis Seaman Test"). Chandris' timely petition for rehearing to the Second Circuit was denied on May 24, 1994. (J.A. 248). This Court granted Chandris' petition for writ of certiorari on October 17, 1994.

SUMMARY OF ARGUMENT

Mr. Latsis failed to object to the District Court's jury instruction on seaman status in its entirety. Therefore, Mr. Latsis was required to establish plain error in order to

avoid the jury's verdict that Mr. Latsis was not a seaman. Because the District Court Instruction conformed with *Wilander*, other Supreme Court precedent, and *Robison*, the District Court Instruction did not constitute any error. Moreover, even if the District Court Instruction was in error, the District Court Instruction did not constitute plain error and the Second Circuit's reversal of the jury verdict and district court judgment is unwarranted.

Two of the undeniable principles articulated in *Wilander* are that (a) seaman status is normally a jury question and (b) seamen do not include land-based maritime workers. Notwithstanding the Court's clear statements of the law, *Latsis* overruled the jury's verdict and ordered the District Court to utilize the Latsis Seaman Test at retrial. The Latsis Seaman Test unequivocally conflicts with *Wilander* because the Latsis Seaman Test would allow a land-based maritime worker to obtain status as a seaman even if the land-based maritime worker spent only ten percent of his work time on vessels. *Latsis'* rebuke of the role of the jury and the land-based/sea-based distinction in *Wilander* is without support. This Court should reject *Latsis*.

The District Court Instruction was based on *Robison* and *Wilander*. The Second Circuit criticized the Robison Seaman Test as a rogue seaman test that places undue emphasis on the temporal aspect of the employment-related connection between a maritime worker and his vessel. However, when the Robison Seaman Test is analyzed in the context of *Wilander* and other Supreme Court precedent, the only potentially valid criticism is that the Robison Seaman Test is less strict than *Wilander* and other Supreme Court decisions regarding who is a

seaman. Mr. Latsis was not prejudiced by the District Court Instruction because the District Court Instruction either applied the law fairly or was unduly favorable to Mr. Latsis. The jury verdict should be reinstated.

In the context of the instant case, the Robison Seaman Test provided a proper beacon for the District Court. However, when seaman status is analyzed in the context of Congress' policy to provide sea-based workers with more protection than land-based workers based on the sea-based worker's exposure to perils *at sea* (or dangers attendant to the movement of vessels on navigable waters), the Robison Seaman Test is too weak. Regardless, when the proper Post-Wilander Seaman Test is articulated, the Post-Wilander Seaman Test is more restrictive than the Robison Seaman Test with respect to who is a seaman. Again, Mr. Latsis benefitted from, and was not harmed by, the District Court Instruction. No basis exists for overturning the jury's verdict.

ARGUMENT

Because of the extensive remedies afforded to seamen under the Jones Act and because the Jones Act does not define the statutory term "seaman," the question of who is a seaman has challenged the state and federal courts since the Jones Act became law in 1920. As one author states, "[i]f one searches through the [seaman status] decisions with enough diligence, language supporting almost any client's argument for or against seaman status can generally be found." David W. Robertson, *A New*

Approach to Determining Seaman Status, 64 Tex. L. Rev. 79, 108 (1985) ("Robertson Article").

Notwithstanding the complexity and confusion regarding the question of who is a seaman under the Jones Act, three unassailable principles emerge from this Court. First, a maritime worker is not required to aid in the navigation of a vessel to qualify as a seaman. *Wilander*, 498 U.S. at 337, 353, 355. Rather, a seaman must contribute to the function of the vessel or the accomplishment of its mission. *Wilander*, 498 U.S. at 355.

Second, if reasonable persons applying the proper legal standard can differ as to whether a maritime worker is a seaman, the maritime worker's ability to qualify as a seaman is a fact question for the jury. *Wilander*, 498 U.S. at 356; *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 371, 374 (1957); *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940).

Third, "Congress established a clear distinction between land-based and sea-based maritime workers." *Wilander*, 498 U.S. at 347. Only sea-based maritime workers, who have an employment-related connection to a vessel in navigation, are seamen. *Wilander*, 498 U.S. at 347-348. Land-based workers are not seamen. *Wilander*, 498 U.S. at 347-348.

Contrary to the Court's second principle, the Second Circuit reversed the jury's determination that Mr. Latsis was not a seaman. In justifying its decision to overrule the jury, the Second Circuit criticized the District Court Instruction. The Second Circuit criticized the District Court Instruction even though the jury verdict was consistent with this Court's third principle, which recognizes

the critical distinction between land-based and sea-based maritime workers. Further, the Second Circuit directed the District Court to utilize a jury instruction that would allow the jury to find that a land-based maritime worker is a seaman, even a land-based worker who spent only ten percent of his work time on vessels.

Latsis violates two of the unassailable principles of this Court. The seaman status test articulated in *Latsis* should be rejected and the jury's decision should be reinstated.

I

MR. LATSIS FAILED TO OBJECT TO THE DISTRICT COURT INSTRUCTION

Rule 51, Federal Rules of Civil Procedure, states as follows:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

As the Second Circuit acknowledged, Mr. Latsis failed to object to the District Court Instruction as a whole. *Latsis*, 20 F.3d at 49. Therefore, the Second Circuit reviewed Mr. Latsis' claim under the plain error standard. *Latsis*, 20 F.3d at 50.

An error is plain "if it results in a miscarriage of justice, or if it is an obvious instance of misapplied law." *Latsis*, 20 F.3d at 49 (citing with approval *Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1078 (2d Cir. 1993)). The District Court Instruction was based on the seaman test stated in

Robison and *Wilander* and was not error. Even if the District Court Instruction is a "slight departure" from the three-part seaman test articulated in *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975) ("Three-part or Salgado Seaman Test"), the District Court Instruction did not constitute plain error sufficient to negate Rule 51, Federal Rules of Civil Procedure.[1] *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992) (no basis for reversal where court's instruction is merely a slight departure from the statutory standard); *Wilander*, 498 U.S. 337.

In *Latsis*, the Second Circuit concluded that it was "plain error" when the District Court failed to use the Three-part or Salgado Seaman Test to instruct the jury. The Second Circuit's criticism of the District Court Instruction is ironic because the Second Circuit itself failed to adopt any portion of the Three-part or Salgado Seaman Test in creating its seaman test in *Latsis*. 20 F.3d at 57.

The District Court's use of a test based on *Robison* and *Wilander* did not "deprive[] the jury of adequate legal guidance to reach a rational decision" or constitute plain error. *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1026 (2d Cir. 1991); *Wilander*, 498 U.S. 337. As discussed below, the District Court

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[1] The Three-part or Salgado Seaman Test instructs as follows:

> [T]he vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation.

514 F.2d at 755.

Instruction either conforms to *Wilander* and represents an accurate statement of the law or the District Court Instruction is more favorable to Mr. Latsis than the seaman test required under *Wilander*. No basis exists for the Second Circuit's finding of plain error and the jury verdict for Chandris should be reinstated.

II

THE LATSIS SEAMAN TEST CONFLICTS WITH *WILANDER* AND OTHER SUPREME COURT PRECEDENT

In *Latsis*, the Second Circuit recognized the need to revise the Three-part or Salgado Seaman Test in the wake of *Wilander* and *Southwest Marine Inc. v. Gizoni*, 502 U.S. 81, 112 S.Ct. 486 (1991). Instead of conforming the new Second Circuit seaman status test to the principles articulated in *Wilander* and *Gizoni*, *Latsis* created the Latsis Seaman Test that conflicts with the decisions of this Court.

Although *Latsis* holds that a substantial employment-related connection to a vessel is necessary to qualify as a seaman, the third element of the Latsis Seaman Test is satisfied if either the duration of the maritime worker's vessel-based employment *or the nature of the maritime worker's contribution to the vessel's mission or function is substantial*. 20 F.3d at 57-58. Pursuant to *Latsis*, the actual time spent aboard a vessel is not determinative. 20 F.3d at 54. Surprisingly, a maritime worker can satisfy the Latsis Seaman Test merely by proving that he expended a substantial amount of shore-based time and effort preparing

to contribute to the function of the vessel or to the accomplishment of its mission, regardless of the amount of time spent on the vessel and regardless of whether the worker is a land-based or sea-based employee. *Latsis*, 20 F.3d at 57.

The conflict between *Latsis* and *Wilander* is not subtle. In overruling the jury verdict, the Second Circuit held as follows:

> Had the jury not been instructed to determine whether Latsis's contribution to the vessel was substantial only in temporal terms of a "permanent assignment" or having performed a substantial part of his work aboard the vessel, the jury could well have found Latsis to be a seaman. A jury could find that he did have a substantial connection with the vessels though he may not have been on board ship a great percentage of his time because he did the specific work of supervising the electronics systems of the ships, upgrading their computerized systems, and dealing with the computerized communication between the ships and office. Thus, *a jury could have found a substantial connection even though Latsis's work did not involve "permanent assignment" to a vessel or to a fleet of vessels and even if we take, as the jury might have taken, Kaparis's testimony that Latsis was on board ships only 10 percent of the time at face value.*

Latsis, 20 F.3d at 54 (emphasis added). Also, *Latsis* instructs that, in determining whether a maritime worker has a substantial employment-related connection to a vessel, "the jury may consider *the amount of time and effort [the maritime worker] spen[ds] ashore* preparing for the contribution, as well as the amount of time and effort spent

in drydock consummating the contribution." 20 F.3d at 57 (emphasis added). In admonishing the District Court regarding how to instruct the jury at the retrial, the Second Circuit explained:

> [T]he jury should also be instructed that in determining what is "substantial" in terms of the nature of Latsis's contribution, Latsis's *on-shore preparation should be taken into account*, as well as the time Latsis spent in drydock in Bremerhaven, Germany consummating his contribution.

Latsis, 20 F.3d at 58 (emphasis added).

Latsis' incorporation of shore-based workers into the class of seamen protected by the Jones Act collides with *Wilander* and ignores the land-based/sea-based distinction mandated by Congress. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("LHWCA"); *Wilander*, 498 U.S. at 347-348, 353-354. Specifically, *Wilander* holds:

> Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.
>
> * * *
>
> [U]nder the Jones Act or general maritime law, seamen do not include land-based workers.
>
> * * *
>
> The "member of a crew" exception in the LHWCA overrules [*International Stevedoring Co. v.] Haverty* [, 272 U.S. 50 (1926)]; "master or member of a crew" restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee.
>
> * * *
>
> We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that "seaman" had been taken to include land-based employees.
>
> * * *
>
> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction.

498 U.S. at 347-348, 353-354. Notwithstanding *Wilander's* unequivocal statements that only sea-based workers are seamen, even land-based workers who spend ninety percent of their time and effort on shore preparing to contribute to the function of a vessel are eligible for seamen status under *Latsis*. 20 F.3d at 54. *Latsis* ignores the sea-based/land-based distinction that is critical to *Wilander*. 498 U.S. at 347-348, 353-354.

This Court should reject the substantial connection test contained in *Latsis* and confirm a test that is consistent with *Wilander* and *Gizoni*. As discussed below, any reasonable interpretation of *Wilander* supports a seaman test that is the same as, or less favorable to Mr. Latsis

than, the District Court Instruction. This Court should reverse the Second Circuit and reinstate the jury's verdict.

III

THE DISTRICT COURT INSTRUCTION IS LESS RESTRICTIVE THAN THE SEAMAN TEST ARTICULATED PREVIOUSLY BY THIS COURT

As recognized by the Second Circuit, the District Court Instruction is based primarily on the seaman test that was originally set forth in *Robison* ("Robison Seaman Test"). The Robison Seaman Test states as follows:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was *assigned permanently to a vessel* (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or *performed a substantial part of his work on the vessel;* and (2) if the capacity in which he was employed or the duties which he performed *contributed to the function of the vessel or to the accomplishment of its mission*. . . .

Robison, 226 F.2d at 779 (emphasis added). The Second Circuit concluded that the District Court's decision to instruct the jury based on the Robison Seaman Test constituted plain error. *Latsis*, 20 F.3d at 46. In support of its conclusion, the Second Circuit criticized this Court for "not even recogniz[ing], much less resolv[ing] the conflict between the criteria used to determine substantial connection under the *Robison* [Seaman T]est and those used under the . . . [Three-part or] *Salgado* [Seaman T]est[]."

Latsis, 20 F.3d at 52. Contrary to the Second Circuit's criticism, *Wilander* is not silent regarding what employment-related connection to a vessel is necessary for a maritime worker to become a seaman. 498 U.S. at 347-348, 353-354.

Wilander and other Supreme Court precedent provide significant guidance to all lower courts regarding the employment-related connection to a vessel in navigation necessary for a maritime worker to qualify as a seaman under the Jones Act. *Wilander* states:

> The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. *See Maryland Casualty Co. v. Lawson*, 94 F.2d 190, 192 (CA5 1938) ("There is implied a *definite and permanent connection with the vessel*, an obligation to forward her enterprise"), cited approvingly in *Norton*, 321 U.S., at 573.

498 U.S. at 355 (emphasis added). Apparently, *Latsis* overlooked the "permanent connection" language in *Wilander*.

In *Norton v. Warner Co.*, 321 U.S. 565 (1944), this Court upheld the reversal of a deputy commissioner's decision that a maritime worker was not a seaman. The Court concluded that the deputy commissioner's decision was erroneous because the maritime worker "had that *permanent attachment to the vessel* which commonly characterizes a crew." *Norton*, 321 U.S. at 573 (emphasis added).

Senko reinstated the jury's finding that plaintiff Senko was a seaman because "[there was] sufficient evidence in

the record for the jury to decide that [*Senko*] was *permanently attached to and employed by the dredge* as a member of its crew." 352 U.S. at 372 (emphasis added).

Likewise, in analyzing the difference between the remedies available to fixed and floating platform maritime workers, *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985), explains as follows:

> Offshore oil rigs are of two general sorts: fixed and floating. Floating structures have been treated as vessels by the lower courts. Workers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships. *If permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA* because they are employed on navigable waters.

470 U.S. at 417 n.2 (emphasis added) (citations omitted).

Finally, in *Gizoni*, the Court affirmed plaintiff Gizoni's right to a jury trial on seaman status where the maritime worker alleged that "as a rigging foreman [the maritime worker] was *permanently assigned* to [a] group of vessels." 502 U.S. at ___, 112 S.Ct. at 490. *Gizoni* affirmed the Ninth Circuit's determination that a summary judgment finding that Gizoni was not a seaman was unwarranted because a fact question existed regarding "whether Gizoni's *relationship to [the vessels] was permanent*." 502 U.S. at ___, 112 S.Ct. at 490.

Existing Supreme Court precedent confirms that the "permanent assignment/substantial performance" prong of the Robison Seaman Test is not too restrictive. Moreover, the Supreme Court's statements to date support the proposition that the Robison Seaman Test is too weak and

that a permanent connection to a vessel is required to establish seaman status. *Wilander*, 498 U.S. at 355; *Gizoni*, 502 U.S. at ___, 112 S.Ct. at 490; *Herb's Welding*, 470 U.S. at 417 n.2; *Norton*, 321 U.S. at 573; *Senko*, 352 U.S. at 372. *But see Butler v. Whiteman*, 356 U.S. 271 (1958); *Grimes v. Raymond Concrete Piling Co.*, 356 U.S. 252 (1958).

Regardless of whether this Court ultimately defines the employment-related connection to a vessel necessary to qualify as a seaman as absolutely permanent or something less, the Second Circuit's criticism of the Robison Seaman Test and the District Court Instruction is meritless.

IV

THE DISTRICT COURT INSTRUCTION IS LESS RESTRICTIVE THAN THE PROPER POST-WILANDER SEAMAN TEST

In describing the need to establish a clear distinction between land-based and sea-based maritime workers, *Wilander* confirms that a critical basis for distinguishing between land-based and sea-based maritime workers is that sea-based workers are regularly exposed to special perils and dangers of work *at sea*. *Wilander*, 498 U.S. at 354. Land-based workers, even those working on navigable waters, are not exposed to perils *at sea* or dangers attendant to moving vessels. *See Bouvier v. Krenz*, 702 F.2d 89, 90-91 (5th Cir. 1983).

In *Wilander*, this Court cited the Robertson Article, 64 Tex. L. Rev. 79, with approval on the limited issue of the importance of the distinction between perils faced by land-based, as opposed to sea-based, maritime workers.

498 U.S. at 354. The Robertson Article describes the relevancy of the perils of the sea to seaman status as follows:

> Exposure to the "perils of the sea" and to risks attending the movement of vessels on navigable water are the distinguishing characteristics of a seaman's work.
>
> * * *
>
> [A]ny list [of perils of the sea] would certainly include the full range of dangers associated with deep water, wind and weather, tides and currents, ocean predators, great distances from shore, relative isolation, and inaccessibility of shore-side facilities for aid and succor.
>
> The sea is obviously a high risk workplace. So is a vessel in motion on navigable water, even though it may be within sight and hailing distance of land. Vessels in active operation are complex industrial enterprises presenting a range of hazards that differ significantly from those incident to work on land, piers, drydocks, and even vessels that are temporarily out of active marine operation while securely moored or anchored in protected inland water. A worker whose duties frequently take him aboard moving vessels, or who is otherwise significantly exposed to risks generated by moving vessels, confronts seamen's dangers. Like the perils of the sea, the risks attending the movement of vessels on navigable water are also distinguishing characteristics of the seaman's work environment.

64 Tex. L. Rev. at 80-81 (footnotes omitted). Thus, the Robertson Article provides compelling arguments supporting this Court's land-based/sea-based distinction

based on the distinct dangers facing those two groups of maritime workers.

Likewise, *Wilander* recognizes the importance of the dangers inherent in working *at sea* in determining who is a seaman. *Wilander* clarifies the remedies available to maritime workers as follows:

> [T]he Jones Act and the LHWCA are mutually exclusive. The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel": "We must take it that the effect of these provisions of the [LHWCA] is to *confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters* and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the [LHWCA]."
>
> * * *
>
> We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work *at sea* in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.

498 U.S. at 347, 354 (emphasis added) (citation omitted) (alterations in original). Sea-based maritime workers receive the added protection and remedies afforded to seamen because they are exposed to (a) the perils of the

sea defined as the full range of dangers associated with working away from port and *at sea* or (b) the dangers attendant to the movement of vessels on navigable waterways. *Wilander*, 498 U.S. 337; *Wallace v. Oceaneering Intern.*, 727 F.2d 427, 433-436 (5th Cir. 1984); Robertson Article, 64 Tex. L. Rev. 79. *See also Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727 (1943).

Conversely, land-based/shore-based workers should receive only the remedies and protection dictated by the LHWCA. *Wilander*, 498 U.S. at 353-354. Shore-based workers should be restricted to the remedies of the LHWCA even though their work is difficult and not risk free and even though they will undoubtedly work aboard vessels moored or docked on navigable waterways and become subject to wind, weather, tides and currents. Robertson Article, 64 Tex. L. Rev. at 80-81, 97. The key difference is that shore-based workers are not subject to those conditions while *at sea* and away from the facilities, comfort and alternatives available while working ashore or aboard a moored or docked vessel. *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 104-105 (1946); *Bouvier*, 702 F.2d at 90-91; Robertson Article, 64 Tex. L. Rev. at 80-81, 97.

In addressing the ability of the Robison Seaman Test to maintain the distinction between sea-based and land-based workers, the Robertson Article states as follows:

> [The first prong of the Robison Seaman Test] . . . served as a ready basis for delimiting seamen from traditional longshoremen and similar *amphibious workers who may spend most of each work day aboard vessels*, but who lack the requisite connection with any particular vessel. As a matter of policy, *it makes sense to exclude such workers from seaman status; their work on stationary vessels, firmly moored or anchored in calm inland waters, does not typically expose them to the perils of the sea or to the characteristic seamen's dangers associated with the movement of vessels on navigable water.*

* * *

> One of the most important functions of the [Robison Seaman Test] approach has been to supply a doctrinal basis for denying seaman status as a matter of law to *longshoremen, ship repairmen, and other shore-based service workers who often spend most or all of their work time aboard vessels. Robison* excludes these workers from seaman status on the basis of their lack of attachment to an identifiable vessel or fleet. The policy of the seamen's protections is well served, inasmuch as *these workers typically do not confront sea perils or dangers associated with the movement of vessels on navigable water.*

64 Tex. L. Rev. at 97, 102-103 (emphasis added). However, as the Robertson Article recognizes, "*Robison* started losing resolving power when the 'fleet [doctrine]' required the courts to forsake the requirement of a work connection to a single vessel." 64 Tex. L. Rev. at 108.

The genesis of the fleet doctrine is *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). The plaintiffs in *Bertrand* could not prove a permanent assignment to, or substantial work aboard, a specific vessel. 700 F.2d at 243. In reversing the District Court's summary judgment against

seaman status, the Fifth Circuit concluded that the plaintiffs satisfied the Robison Seaman Test because the plaintiffs performed a substantial part of their work aboard an identifiable fleet of vessels. *Bertrand*, 700 F.2d at 248. Since *Bertrand*, an employment-related connection to one specific vessel is not necessary to qualify as a seaman. 700 F.2d at 244-245; *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1257-1258 (3d Cir. 1994).

In certain circumstances involving shore-based amphibious workers, the fleet doctrine improperly weakens the ability of the Robison Seaman Test to distinguish between sea-based and land-based workers. For example, under the Robison Seaman Test as supplemented by the fleet doctrine, a shore-based maritime worker ("Shore-based Worker") who is employed by a shoreside vessel repair or maintenance company ("Repair Facility Employer") *superficially* satisfies the Robison Seaman Test if the Shore-based Worker spends a substantial portion of his time working aboard a fleet of vessels owned by a single legal entity (the "Fleet") on a navigable waterway ("Navigable Waterway").

Moreover, the Shore-based Worker could superficially satisfy the Robison Seaman Test even though all of his work aboard the Fleet occurred while the vessels were secured to the Repair Facility Employer's pier and in sheltered waters. Also, the Shore-based Worker could superficially satisfy the Robison Seaman Test even though the Shore-based Worker is performing the exact same work that his next-door neighbor is performing at a ship repair or maintenance facility ("Neighbor") on the same Navigable Waterway as long as the Neighbor's employer

performs repair and maintenance work for several different owners.

The achilles heel of the Robison Seaman Test after the fleet doctrine is that the Shore-based Worker is arguably "perform[ing] a substantial part of his work on [a fleet of] vessel[s] and contribut[ing] to the function of the vessel[s] or to the accomplishment of [their] mission." *Robison*, 226 F.2d at 779. Conversely, the Neighbor performing the same work on the same Navigable Waterway is unequivocally a longshoreman because the Neighbor does not perform a substantial part of the Neighbor's work for an identifiable fleet. *Campo v. Electro-Coal Transfer Corp.*, 970 F.2d 51 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1261 (1993).[2]

Nevertheless, the fleet doctrine is not inherently flawed. The deficiency lies in the Robison Seaman Test's inability to completely distinguish between land-based and sea-based maritime workers based on their relevant exposure to perils *at sea* or attendant to the movement of vessels on navigable waters. This deficiency in the legal definition of a seaman must be remedied because "[i]t is for the court to define the statutory standard. 'Member of a crew' and 'seaman' are statutory terms; their interpretation is a question of law." *Wilander*, 498 U.S. at 356. As the Robertson Article notes:

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[2] Similarly, before the fleet doctrine, Mr. Latsis' status as a longshoreman under the LHWCA would be manifest. Mr. Latsis had no permanent or substantial work-related connection with any specific Chandris vessel. Therefore, absent the fleet doctrine, Mr. Latsis would have no basis to assert seaman status.

> The courts can either attempt to resuscitate *Robison* in some fashion, or they can acknowledge the degree of the injured worker's exposure to seamen's dangers – perils of the sea or dangers associated with the movement of vessels on navigable water – as a controlling part of the applicable doctrine.

64 Tex. L. Rev. at 111-112 (footnote omitted).[3]

Based on this Court's acknowledgment of the importance of the relationship between working *at sea* and the special protection afforded to seamen, this Court's positive reference to the dissent in *Sieracki*, 328 U.S. 85, and Congress' clear intent to differentiate between shore-based and land-based maritime workers with the passage of the LHWCA, Chandris submits that the following seaman test best implements the law required by Congress and interpreted by *Wilander* ("Post-Wilander Seaman Test"):

> A maritime worker is a seaman if the worker: (1) has a permanent employment connection to a vessel in navigation or performs a substantial part of his work on a vessel while exposed to marine perils *at sea* or to the dangers attendant to the movement of vessels on navigable waters; and (2) contributes to the function of the vessel or the accomplishment of its mission.

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[3] Another option is to eliminate the Substantiality Prong of the Robison Seaman Test and require maritime workers to have a permanent connection to a vessel or fleet of vessels to qualify as a seaman. *Wilander*, 498 U.S. at 355; *Gizoni*, 502 U.S. ___, 112 S.Ct. at 490; *Herb's Welding*, 470 U.S. at 417 n.2; *Senko*, 352 U.S. at 372; *Norton*, 321 U.S. at 573. *But see Butler*, 356 U.S. 281; *Grimes*, 356 U.S. 252.

The Post-Wilander Seaman Test reflects the Court's recognition of Congress' mandate to distinguish between land-based and sea-based maritime workers.[4] Also, the Post-Wilander Seaman Test is based on the relevant policy considerations that maritime workers who are exposed to the additional marine perils associated with being away from port and *at sea* or the dangers attendant to the

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[4] The Court's emphasis on the perils faced by maritime workers *at sea*, as opposed to "perils of the sea," is critical. *Wilander*, 498 U.S. at 354. This emphasis must be maintained so that juries deciding seaman status cases can apply the proper legal standard in distinguishing between sea-based and land-based maritime workers. *Wilander*, 498 U.S. at 347-348, 353-356. Juries must not be allowed to consider the time that a maritime worker is aboard a vessel moored or docked at a pier as satisfying the substantial performance prong of the Post-Wilander Seaman Test based on the argument that the maritime worker faces "perils of the sea" such as wind, weather, tides, currents, parting lines, drowning, exposed decks, slippery surfaces, and poor communication with shore. If juries are allowed to consider a maritime worker's time aboard a docked or moored vessel in determining seaman status, the law governing land-based maritime workers will regress to *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926) and *Sieracki*, 328 U.S. 85 (both improperly conferring seaman status on land-based maritime workers). *Wilander*, 498 U.S. at 346-348. Congress' intent to distinguish between sea-based and land-based workers in passing the LHWCA is clear. *Wilander*, 498 U.S. at 347-348, 353-354. Absent clear instructions requiring juries to consider only perils from maritime work *at sea* (or attendant to the movement of vessels), the distinction between (a) sea-based maritime workers or "seaman" and (b) land-based maritime workers or "longshoreman" will be lost. Juries make findings of fact. *Wilander*, 498 U.S. at 355-356. However, unless juries are given clear, specific legal instructions defining who is a seaman, Congress' intent will not be fulfilled.

movement of vessels should receive the special remedies available only to seamen.

Conversely, land-based maritime workers, even those who spend a substantial amount of time maintaining, repairing or unloading vessels on navigable waterways, should receive the remedies provided by the LHWCA.

Most significantly, the Post-Wilander Seaman Test is less favorable to Mr. Latsis than the District Court Instruction. Therefore, because the Latsis Seaman Test conflicts with *Wilander* and other Supreme Court precedent and because the District Court Instruction is based on the Robison Seaman Test (which is less restrictive than the Post-Wilander Seaman Test), the District Court Instruction does not constitute plain error. This Court should reverse the Second Circuit and reinstate the jury's verdict.

CONCLUSION

The judgment of the Second Circuit should be reversed and the District Court jury verdict and judgment should be reinstated.

Respectfully submitted,

David W. McCreadie
(Counsel of Record)
David F. Pope
Lau, Lane, Pieper, Conley
& McCreadie, P.A.
Post Office Box 838
Tampa, Florida 33601-0838
(813) 229-2121

and

Christ Stratakis
William J. Brady, III
Poles, Tublin, Patestides
& Stratakis
46 Trinity Place
New York, New York 10006
(212) 943-0110

Attorneys for Chandris, Inc., Chandris, S.A. and Fourth Transoceanic Shipping Co., Ltd., Petitioner